(2)

Supreme Court, U.S.
FILED
MAR 4 1996
CLERK

No. 95-1250

In The
Supreme Court of the United States
OCTOBER TERM, 1995

WAYNE DOLCIFINO,

Petitioner,

VS.

THE HONORABLE ELIZABETH RAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

RESPONDENT'S (REAL PARTY IN INTEREST) BRIEF IN OPPOSITION

RONALD G. FRANKLIN
FRANKLIN, CARDWELL & JONES
A PROFESSIONAL CORPORATION
Texas Commerce Tower
600 Travis, 24th Floor
Houston, Texas 77002
(713) 222-6025
(713) 222-0938

Attorneys for Respondent

March 1, 1996

29 pp

QUESTION PRESENTED

Whether, in a libel action brought by a public official, a trial judge may compel a journalist to testify about his discussions with a specific witness who was identified through the ordinary course of discovery and has knowledge of relevant facts?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iii

OPINIONS BELOW. 1

STATEMENT OF THE CASE. 2

REASONS FOR DENYING THE WRIT. 3

1. This Case Presents No Constitutional Question 3

2. Even If A Qualified Journalist's Privilege Exists In This Case, The Courts Below Were Correct In Overruling The Privilege With Respect To The Interrogation Of Dolcifino About Perry 3

CONCLUSION. 6

APPENDIX. A1

TABLE OF AUTHORITIES
CASES

Page

Dallas Morning News v. Garcia, 822 S.W.2d 675
(Tex. App. -- San Antonio 1991, no writ) 3, 4

No. 95-1250

In The
Supreme Court of the United States
OCTOBER TERM, 1995

WAYNE DOLCIFINO,

Petitioner,

VS.

THE HONORABLE ELIZABETH RAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

RESPONDENT'S (REAL PARTY IN INTEREST) BRIEF IN OPPOSITION

OPINIONS BELOW

On March 27, 1995, the real party in interest, Sylvester Turner, obtained an order from Judge Elizabeth Ray, of the 165th District Court of Harris County, Texas ordering Petitioner to testify about his communications and contacts with a specific relevant fact witness, Peary Perry. Petitioner's writ erroneously describes that order as one "ordering Petitioner to answer deposition questions that would tend to reveal the identity of a confidential source." Appendix at A1. No such order was ever requested or entered. On April 18, 1995, the Court ordered Petitioner to answer seven written questions about his communication with Perry. Appendix at A2.

On June 15, 1995, the First District Court of Appeals of Texas, denied Petitioner's Request for Leave to File a Petition for Mandamus as

reported at 902 S.W.2d 163. Appendix at A3. On August 24, 1995, the First District Court of Appeals of Texas again denied leave and *en banc* consideration. Appendix at A4.

The Texas Supreme Court denied Petitioner's Motion for Leave to file Petition for writ of Mandamus on October 12, 1995, and denied rehearing of the Motion on November 9, 1995. Appendix at A5 and A6, respectively.

STATEMENT OF THE CASE

On November 26, 1991, a Houston investigator called a KTRK-TV anchorwomen, and informed her that local attorney and then mayoral candidate, Sylvester Turner, had been involved in the representation of a man who had subsequently faked his death in an insurance fraud scheme. He informed her that if the station wished to pursue this matter and obtain relevant documents, the reporter should contact Peary Perry, another local investigator and member of the adverse candidate's campaign finance committee. She gave Perry's name to KTRK's crack investigative reporter, Wayne Dolcifino. Dolcifino acknowledges that he did have "contact" with Perry during the four days that he investigated this matter before airing his December 1, 1991 stories. In those broadcasts, Dolcifino supports his broad claim that Turner had a "role in an attempted insurance swindle" with other specific falsehoods. Turner sued Dolcifino and his employer, KTRK-TV.

As described above, KTRK-TV's own employees provided evidence about Perry's involvement in this matter. This evidence - obtained without objection or court intervention - establishes Perry as a relevant fact witness. Turner then successfully obtained an order from the trial court compelling Dolcifino to answer specific questions about his communications and contacts with Perry. (March 27, 1995 Order). Appendix at A1.

Dolcifino continues to mischaracterize Judge Ray's Order as one compelling him to disclose the identify of a confidential source. Turner made no such request, and Judge Ray made no such order.

REASONS FOR DENYING THE WRIT

1. This Case Presents No Constitutional Question

Despite Petitioner's grand claims, the instant case does not rise to a consideration of First Amendment issues. As Judge Ray's Order declares,

> "Plaintiff's motion is limited. Turner does not seek to compel Dolcifino to reveal the identity of "the confidential source" identified by Dolcifino as one of his sources for the December 1, 1991 broadcast; instead, Plaintiff's motion seeks to compel Dolcifino to answer questions relating to his contacts with a single, identifiable person; namely Peary Perry who has knowledge of relevant facts."

Simply stated, the trial court did not order Dolcifino to disclose the identity of his confidential source. Furthermore, Judge Ray was extremely cautious in fashioning her March 27, 1995 Order so as to prevent the inadvertent disclosure of any confidential source. Indeed, the Court was careful to put in place certain procedural safeguards - including *in camera* questioning - to protect any potentially privileged disclosure.

2. Even If A Qualified Journalist's Privilege Exists In This Case, The Courts Below Were Correct In Overruling The Privilege With Respect To The Interrogation Of Dolcifino About Perry

To the extent that this Court may determine that the issue presented may raise a First Amendment issue, the record below establishes a careful and deliberate balancing of Petitioner's claim of a qualified journalist's privilege. As Petitioner's own Brief makes clear, the journalist's privilege is not absolute:

> "In discussing whether a reporter can be compelled to testify about his news gathering activities, all federal courts of appeals, including the Sixth Circuit, and this Court have advocated a balancing of the right to a free press with other vital public interests, such as . . . a competing Sixth Amendment right to a fair trial." Petitioner's Brief at 24.

Texas has adopted the identical view. *Dallas Morning News v. Garcia*, 822 S.W.2d 675 (Tex. App. - San Antonio 1991, no writ) instructs that the trial court must examine the facts "on a case by case basis in the course of balancing the need for the testimony against the claims of the news gatherer that the public's right to know is impaired." *Id.*, at 679.

Dolcifino now attacks the balancing process as performed below and complains that somehow during the several years that Texas courts have been considering this issue, the trial court, Texas' First District Court of Appeals, and the Texas Supreme Court have all missed the boat - they have each been balancing the rights of the newsman against those of the confidential source, rather than competing First and Sixth Amendment interests.

This argument is insulting. Although Dolcifino now neglects to cite *Dallas Morning News v. Garcia* in his Petition, this controlling Texas case served as the basis for both parties' arguments and the trial court's decision. Judge Ray's reasoning was not flawed. Fortunately, there is no need to speculate. Her order is unequivocal:

> "The court is mindful of the Constitutional protection afforded to the press to seek out the news while being shielded from disclosure of confidential sources, and the requirement to consider each case on an ad hoc basis as set out in *Dallas Morning News v. Garcia*, 822 S.W.2d 675 (Tex. App. - San Antonio 1991, no writ). The court is also mindful of the competing interests of the Open Courts Doctrine of the Texas Constitution and the Texas Rules of Civil Procedure, which sets forth the rights of a party to obtain relevant discovery.
>
> The court hereby finds as follows:
>
> > . . . (7) After balancing all factors unique to this matter, the court rules that Plaintiff has met the requirements of both Texas and federal common law sufficient at least to overcome any claim of journalist's privilege with respect to the interrogation of Dolcifino about the nature and extent of all contacts he had with Peary Perry before December 1, 1991."

The trial court performed the balancing as required by *Dallas Morning News* and controlling federal law. Petitioner's real - and only complaint is that he is unhappy with the outcome of that balancing process. He fails to recognize that a "qualified journalist's privilege" does not completely relieve a reporter from his obligation to testify about significant relevant facts. This was the basis for Judge Ray's decision, and it should be up held.

CONCLUSION

This matter does not rise to a consideration of Constitutional issues. Petitioner mischaracterizes Judge Ray's decision. No where does the Court compel Dolcifino to reveal a confidential source. Instead, the Court permits Turner to interrogate Dolcifino about his contacts and communication with a specific fact witness, who by the Defendants' own admission has knowledge of relevant facts. Even if First Amendment issues are raised by Turner's efforts to interrogate Dolcifino about Perry, the trial court performed a thorough and proper analysis of competing Constitutional interests as mandated by controlling Texas and federal law.

The writ of certiorari should be denied.

Respectfully submitted,

Ronald G. Franklin*
Franklin, Cardwell & Jones
A PROFESSIONAL CORPORATION
Texas Commerce Tower
24th Floor, 600 Travis
Houston, Texas 77002
(713) 222-6025

Ralph S. Carrigan
Robert E. Lapin
Carrigan, Lapin, Landa & Wilde
One Allen Center
500 Dallas Street, Suite 2600
Houston, Texas 77002-4708
(713) 654-4400

*Counsel of Record For Respondent
March 1, 1996

APPENDIX

NO. 92-32914

SYLVESTER TURNER	§	IN THE DISTRICT
	§	COURT OF
	§	
V	§	HARRIS COUNTY,
	§	
WAYNE DOLCIFINO,	§	
KTRK TELEVISION, INC.,	§	165TH JUDICIAL
AND CAPITAL CITIES/	§	DISTRICT
ABC, INC.	§	

ORDER CONDITIONALLY GRANTING PLAINTIFF'S MOTION TO COMPEL DEFENDANT WAYNE DOLCIFINO TO TESTIFY CONCERNING PEARY PERRY

Came on to be heard Plaintiff's Motion to Compel Defendant Wayne Dolcifino to Testify Concerning Peary Perry ("Plaintiff's motion") and the court, after consideration of the parties' evidence, briefs and arguments, is of the opinion that said motion should be *conditionally granted*.

The court is mindful of the Constitutional protection afforded to the press to seek out the news while being shielded from disclosure of confidential sources, and the requirement to consider each case on an ad hoc basis as set out in *Dallas Morning News v. Garcia*, 822 S.W.2d 675 (Tex. App.-San Antonio 1991, no writ). The court is also mindful of the competing interests of the Open Courts Doctrine of the Texas Constitution and the Texas Rules of Civil Procedure, which sets forth the rights of a party to obtain relevant discovery.

The court hereby finds as follows:

1. Plaintiff's motion is limited. Turner does not seek to compel Dolcifino to reveal the identity of "the confidential source" identified by Dolcifino as one of his sources for the December 1, 1991 broadcast; instead, Plaintiff's motion seeks to compel Dolcifino to answer questions relating to his contacts with a single, identifiable person; namely, Peary Perry who has knowledge of relevant facts.

2. Dolcifino has already testified that he did in fact meet Perry sometime in the several days before the December 1, 1991 broadcast. Dolcifino, however, refuses to answer questions about the nature of the contact or information imparted, claiming a "qualified journalist's privilege."

3. Plaintiff alleges that the Defendant's December 1, 1991 10:00 p.m. broadcast includes statements about the identity of Channel 13's source for the Foster story. Plaintiff's cause of action challenges the veracity of those statements.

4. Defendant's December 5, 1991 broadcast which, on its face, seeks to identify the "real source" of the Foster story, opens the door for discovery by Plaintiff to challenge the veracity of that statement. Defendant's conduct as embodied by its December 5 broadcast is discoverable requiring Plaintiff's claim of actual malice.

5. Perry has repeatedly testified that he has "no recollection" of imparting confidential information to Dolcifino about the Foster matter and accordingly, has "no recollection" of requesting that Dolcifino maintain his anonymity in connection with that subject matter. Accordingly, the court finds that Dolcifino testimony is Plaintiff's only method of proof concerning Perry's involvement in this controversy.

6. The court further finds Defendants' claim of privilege is insupportable because the alleged source is no longer "confidential." Indeed, it was through Plaintiff's efforts as required by *Dallas Morning News* that Perry was identified as a probable source. Accordingly, common sense dictates that the contents of the meetings and/or documents produced by that source cannot be held subject to the privilege unless the revelation of that information will lead to another confidential source.

7. After balancing all factors unique to this matter, the court rules that Plaintiff has met the requirements of both Texas and federal common law sufficient at least to overcome any claim of

journalist's privilege with respect to the interrogation of Dolcifino about the nature and extent of all contacts he had with Peary Perry before December 1, 1991.

To that end, the Court is desirous of imposing some procedural limitations to ensure that the "journalist's privilege," to the extent that it may apply, is carefully protected.

It is, therefore

ORDERED, ADJUDGED AND DECREED as follows;

1. Defendant Wayne Dolcifino shall appear for the continuation of his deposition in the 165th Judicial District Court on March 27th, 1995, at 9:00 a.m., to be presided over by the Court, to answer questions propounded to him by Plaintiff's counsel attached hereto as Exhibit A, concerning his pre-December 1, 1991 broadcast contacts with Peary Perry.

2. If, in response to any of the questions, Dolcifino asserts the "journalist's privilege," all present except Dolcifino, his counsel, the court reporter and judge shall be excused. Dolcifino shall then be directed to answer those questions *in camera*, under oath and on the record.

   If Dolcifino answers the questions and the court determines that certain of the questions are appropriate under the principles governing assertion of the "journalist's privilege," the court shall so rule and the *in camera* proceeding shall end. Once all parties and counsel have returned to open court, those of Dolcifino's answers which the court has rules are not privileged, shall be read to Plaintiff's counsel, unless Dolcifino advises the court of his intent to immediately seek appellate review of the court's ruling. If the court is so advised, the order overruling the objections on the basis of privilege will be stayed while Mr. Dolcifino seeks appellate review of such order so long as appellate review (by mandamus or otherwise) is sought not later than 30 days after the court's ruling. The stay shall remain in effect until all appeals (including man-

damus) are exhausted or Mr. Dolcifino advises the court that no further appellate review is sought. The *in camera* record will be sealed pending the outcome of the appeal.

If Dolcifino answers the questions and the court determines that any questions invade privileged matters, the *in camera* record will be sealed and Plaintiff's counsel will not be permitted to know Dolcifino's answer to the question.

If Dolcifino refuses to answer the questions in accordance with the above procedure, the court shall rule in open court, and if appropriate, will direct Dolcifino to answer. If he refuses, and advises the court of his intent to immediately seek appellate review of the court's ruling, the rulings will be stayed while Mr. Dolcifino seeks appellate review of such order so long as appellate review (by mandamus or otherwise) is sought not later than 30 days after the court's ruling. The stay shall remain in effect until all appeals (including mandamus) are exhausted or Mr. Dolcifino advises the court that no further appellate review is sought.

3. The court will determine when this deposition shall be concluded.

Furthermore, the Court hereby incorporates its letter opinion dated November 9, 1994, and attaches a copy of the same hereto as an expression of the basis for its findings and order entered today.

SIGNED and ENTERED this 27 day of March, 1995.

ELIZABETH RAY
JUDGE PRESIDING

EXHIBIT "A"

QUESTIONS TO BE PROPOUNDED TO WAYNE DOLCIFINO

Definitions

With regard to the following questions, any reference to the "Foster matter" is meant those general facts and circumstances relating to the alleged accidental death of Sylvester C. Foster on or about June 22, 1986, his will and probate related thereto, and any involvement by Sylvester Turner in that matter or controversy.

Questions:

1. At any time before 10:00 p.m. December 1, 1991, did Shara Fryer suggest or indicate to you in any manner that Peary Perry may be a source of information about the "Foster matter"?

2. If so, when did she communicate that to you, in what form, and what specifically did she say or communicate?

3. At any time before 10:00 p.m. December 1, 1991, did Clyde Wilson suggest or indicate to you in any manner that Peary Perry may be a source of information about the "Foster matter"?

4. If so, when did he communicate that to you, in what form, and what specifically did he say or communicate?

5. What contacts or communications, if any, did you have with Peary Perry on or during Wednesday, November 27 through 10:00 p.m. December 1, 1991?

6. With respect to each contact or communication, if any, that you had with Perry, state:

   a) the date, time, place and method of the contact or communication,
   b) who initiated the contact or communication,
   c) the length of time of the contact or communication, and
   d) the specific subject matter of the contact or communication.

7. At any time before 10:00 p.m. December 1, 1991, did Peary Perry impart to you any information relating in whole, or in part, to the "Foster matter"?

   If so, what specific information, and when did he impart it to you?

8. At any time before 10:00 p.m. December 1, 1991, did Peary Perry provide you with any documents or written material of any nature relating in whole, or in part, to the "Foster matter"?

   If so, describe the specific documents, explain when he provided them to you, and describe specifically what information they contained.

9. At any time before 10:00 p.m. December 1, 1991, to your knowledge or belief, did Peary Perry deliver or cause to be delivered to you or Channel 13 any documents from the Foster probate files? If so, specifically describe the documents?

10. At any time before 10:00 p.m. December 1, 1991, did Peary Perry advise you that he was attempting to obtain certain probate documents from the "Foster matter"?

    If so, did Perry advise you who or what persons were obtaining the selected probate documents?

11. At any time before 10:00 p.m. December 1, 1991, did Peary Perry provide you with the names of any other persons whom he believed could provide information about the "Foster matter"?

12. If so, please list the names of any such persons whom you do not consider to be a confidential source.

    If you do consider such a person as a confidential source, please so designate the person as such, and explain under what circumstances the source sought confidentiality.

13. Did you learn at any time before 10:00 p.m. December 1, 1991 that Peary Perry was in any manner affiliated with the mayoral campaign of Bob Lanier?

If so, what did you learn, and how did you obtain that information?

14. During any meetings, communications, or contacts with Perry that you may have had before 10:00 p.m. December 1, 1991, did you learn or inquire of him if he was affiliated with the mayoral campaign of Bob Lanier?

If so, what did he tell you about his affiliation or role in the Lanier campaign?

JUDGE ELIZABTH RAY
165TH DISTRICT COURT
HARRIS COUNTY CIVIL COURTHOUSE
HOUSTON, TEXAS 77002
(713) 755-6320

November 9, 1994

Mr. Charles L. Babcock
Jackson & Walker
1100 Louisiana, Suite 4200
Houston, Texas 77210

Mr. Ronald G. Franklin
Franklin, Cardwell & Jones
600 Travis
Houston, Texas 77002

RE: Sylvester Turner v. Wayne Dolcifino, KTRK Television, Inc. and Capital City/ABC, Inc.: C.A. 92-32914, pending in the 165th District Court of Harris County, Texas.

Gentlemen:

The Court has given careful consideration to the arguments and legal authority supplied by both parties in connection with the motion of the Plaintiff to require Defendant Dolcifino to answer questions regarding his meetings and/or conversations with Mr. Peary Perry.

The Court is mindful of the Constitutional protection afforded to the press to seek out the news while being shielded from disclosure of confidential sources, and the requirement to consider each case on an ad hoc basis as set out in *Dallas Morning News v. Garcia*, 822 S.W.2d 675 (Tex. App.--San Antonio, 1991, no writ). The Court also notes that there is no Texas Supreme Court case which confirms the journalist's privilege, nor is there statutory authority for one. The Texas Rules refer to numerous other privileges, but do not set out one for journalists. The case cited by the

Respondent to support the notion that such a privilege exists, *Branzburg v. Hayes*, 408 U.S. 665 (1972), appears to reach a different ruling. The Court must also consider the rights under the Open Courts Doctrine of the Texas Constitution and the Texas Rules of Civil Procedure which set forth the right of a party to obtain information in connection with his case. However, since there appear to be two cases of appellate authority in this State which recognize a journalist's privilege, (see *Dallas Morning News v. Garcia*, cited infra and *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470 [Tex. App.--Houston {1st Dist.} 1987, no writ]), the Court has continued with its analysis of the motion.

In connection with its decision, the Court has looked with specificity to the request made by the Plaintiff at this time, and distinguishes this request made from the easier question of whether Mr. Dolcifino is required to reveal his sources for the news stories that were run by Defendant KTRK Television on December 1 and 5, 1990 (sic), respectively.

In argument before the Court, Plaintiff stated that "We are not here today asking that you force Channel 13 to reveal their confidential source . . . We are here today asking that the Court allow Plaintiff's counsel to inquire of Mr. Dolcifino about his contacts with a single, identifiable human being, Peary Perry, who we know through their own admission, has potentially relevant facts to offer in this case because we know Dolcifino met with him during this time frame . . ." (Transcript of hearing, pages 30-31, October 21, 1994.)

Specifically, the Plaintiff has alleged that Mr. Dolcifino has confirmed that he met with Mr. Perry during the week before the December 1 broadcast, although Mr. Perry's sworn testimony is that he does not recall any meetings, phone conversations or communications with Mr. Dolcifino during that week. (Deposition of Wayne Dolcifino, VI. III, pps. 8-9, January 17, 1994.) Mr. Perry, in his deposition, testifies that, since he did not recall meeting with Mr. Dolcifino, he likewise did not recall asking Mr. Dolcifino to maintain his confidentiality as a source. (Deposition of Peary Perry, March 29, 1994, pps. 81-85.)

In his deposition, Mr. Dolcifino declines to answer questions regarding the substance of his meetings with Mr. Perry by citing the journalistic privilege against revealing sources. Mr. Dolcifino does testify, however, that he met with Mr. Perry during this time frame. (Deposition of

Wayne Dolcifino, VI. V., March 31, 1994, pps. 8-17.)

There is no disagreement that the privilege belongs to the journalist. When the dust settles, then, the sole issue is whether this Court should compel Mr. Dolcifino to testify about the substance of any meetings or conversations he had with Mr. Perry, and what documents, if any, were produced by Mr. Perry to Mr. Dolcifino during those meetings.

Mr. Dolcifino's position is that he may stand on the journalist's privilege even after a specific person has been identified, and even after the journalist himself has divulged that meetings and/or conversations with the identified person have taken place. Neither counsel has been able to provide case law to the court on this specific point.

To muddy the legal water even further, the issue of waiver has been raised based on the December 5, 1990 (sic) broadcast in which Clyde Wilson, a local investigator, identified himself as the "real source" of the December 1, 1990 (sic) story. The question of whether Mr. Wilson was, indeed, the "real source" is the heart of the plaintiff's motion, and I believe the identification by the Defendant KTRK of the "real source" opens the door for investigation by the plaintiff of the veracity of that statement.

In *Dallas Morning News v. Garcia*, 822 S.W.2d 675 (Tex. App.--San Antonio, 1991, no writ), the Court held that, in order to claim a journalist privilege, the following elements must be met. First, the party asserting the privilege carries the burden of proof to establish the existence of the privilege. (*Id.*, at p. 679). Second, the party resisting discovery must produce evidence supporting the particular privilege . . . claimed. (*Id.*). The *Dallas Morning News* case analysis then turns to the elements required to be proved by the party seeking discovery of the names of the confidential source, ". . . reasonable efforts (must) have been made to learn the informant's identity by alternate means, but . . . no other means are available. . ." (*Id.* at p. 680.).

The plaintiff in this case has gone beyond the facts of the *Dallas Morning News* case by doing exactly what the San Antonio Court of Appeals required him to do -- use alternate means to learn the informant's identity. They have identified this person to be Mr. Perry. Now they seek to learn what information was disseminated by Mr. Perry to Mr. Dolcifino. If Mr. Dolcifino's position were correct, then it would be meaningless to

require the movant to seek alternate means to learn of an informant's identity because the movant would still be precluded, even after discovering the identity of the confidential source, from discovering the contents of the communications between the journalist and the source.

Mr. Dolcifino's position is insupportable because the source is no longer "confidential". Once the identity of a source is discovered, then common sense dictates that the content of the meetings and/or documents produced by that source cannot be held subject to the privilege unless the revelation of that information will lead to another confidential source.

The inquiry, then, becomes whether, by discussing the content of the meetings and/or documents exchanged between Messrs. Dolcifino and Perry, Mr. Dolcifino will be required to divulge additional confidential sources. Procedural safeguards can be placed to assure that this will not occur.

For the foregoing reasons, the Court has decided to grant the plaintiff's motion, with some procedural limitations. First, Mr. Turner's lawyer will subpoena Mr. Peary Perry to appear in the 165th District Court. Mr. Perry will be asked under oath, (1) whether he requested anonymity from Mr. Dolcifino before December 1, 1990 (sic), and (2) whether he has requested anonymity at any time before or up to the time of the hearing. If Mr. Perry answers "no" to those questions, then the deposition of Mr. Dolcifino will resume in the courtroom of the 165th District Court at some later date which is agreeable to the parties and to the Court, and I will preside over the deposition. As each question is asked, if Mr. Dolcifino asserts a privilege, Mr. Turner and his counsel will leave the room, and Mr. Dolcifino will answer the question under oath and on the record. If the Court rules that the answer is not violative of any privilege, then the answer will be read to Plaintiff's counsel upon his return. As to those answers which the Court rules would violate any privilege, the record will be sealed. If Mr. Perry answers "yes" to those questions, the Court will require further briefing from parties in connection with the effect of Mr. Perry's testimony.

I will rely on counsel to set these proceedings in a manner consistent with the Court's scheduled, and ask counsel to call Deb Grun at 755-7590 to do so.

I will enter an order which specifically sets out these rulings as soon as possible, but the order will be held in abeyance for a period of thirty (30) days to allow Mr. Dolcifino to seek appellate review.

Sincerely,

/s/ ELIZABETH RAY
Elizabeth Ray

NO. 92-32914

SYLVESTER TURNER	§	IN THE DISTRICT
	§	COURT
Plaintiff,	§	
	§	
VS	§	HARRIS COUNTY,
	§	TEXAS
WAYNE DOLCIFINO,	§	
KTRK TELEVISION, INC.,	§	
CC TEXAS HOLDING	§	
CO., INC. AND CAPITAL	§	
CITIES/ABC, INC.,	§	
	§	
Defendants.	§	165TH JUDICIAL
	§	DISTRICT

ORDER

On the 27th day of March, 1995 the Court convened a hearing in the above-referenced case pursuant to the Court's Order conditionally granting Plaintiff's Motion to Compel Wayne Dolcifino to testify concerning Perry Peary. Mr. Dolcifino was present in Court and represented by counsel. The questions to be propounded to Mr. Dolcifino are attached as Exhibit "A" to the Court's March 27 Order. Mr. Dolcifino responded to questions one, two, three, four, five, thirteen and fourteen.

Mr. Dolcifino asserted a claim of journalistic privilege with respect to questions six, seven, eight, nine, ten, eleven and twelve. The Court convened an *in camera* proceeding and, based upon the findings numbered 1-7 in the Court's March 27, 1995 Order, which are incorporated herein, makes the following rulings following receipt of Mr. Dolcifino's testimony in the *in camera* proceeding.

1. With respect to question no. six Mr. Dolcifino's claim of journalistic privilege is overruled.

2. With respect to question no. seven Mr. Dolcifino's claim of journalistic privilege is overruled.

3. With respect to question no. eight Mr. Dolcifino's claim of journalistic privilege is overruled.

4. With respect to question no. nine Mr. Dolcifino's claim of journalistic privilege is overruled.

5. With respect to question no. ten Mr. Dolcifino's claim of journalistic privilege is overruled.

6. With respect to question no. eleven Mr. Dolcifino's claim of journalistic privilege is sustained.

7. With respect to question no. twelve Mr. Dolcifino's claim of journalistic privilege is sustained.

IT IS SO ORDERED.

SIGNED this 18 day of April, 1995 at Houston, Texas.

ELIZABETH RAY
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ RONALD G. FRANKLIN, ESQ.
Ronald G. Franklin, Esq.
Franklin, Cardwell & Jones
Texas Commerce Tower, 24th Floor
600 Travis
Houston, Texas 77002
Tel: (713) 222-6025
Fax: (713) 222-0938

/s/ CHARLES L. BABCOCK, ESQ.
Charles L. Babcock, Esq.
Jackson & Walker, L.L.P.
1100 Louisiana, Suite 4200
Houston, Texas 77002
Tel: (713) 752-4210
Fax: (713) 752-4221

Motion for leave to file petition of writ of mandamus denied and Opinion filed June 15, 1995

(SEAL)

In The
Court of Appeals
For The
First District of Texas

NO. 01-95-00453-CV

WAYNE DOLCIFINO, Relator

V.

THE HONORABLE ELIZABETH RAY, Respondent

Original Proceeding on Motion for Leave to File Petition for Writ of Mandamus

OPINION

Relator, a journalist, seeks a writ of mandamus relieving him from the trial court's order to answer questions about information given to him by Mr. Perry. The real party in interest, Sylvester Turner, has sued Dolcifino for slander. Although Mr. Perry gave the information in confidence, Mr. Turner discovered Mr. Perry's identity through his own investigation, without any disclosure by Dolcifino and without any compulsion by the respondent, Judge Ray. Mr. Perry has already been deposed and has testified about what he did and did not tell Mr. Dolcifino. Mr. Perry is not a journalist, and no one claims he has any privilege. Mr. Dolcifino claims, for himself, a journalist's privilege, based on the first amendment to the United States Constitution and article one, section eight, of the Texas Constitution, to refuse to answer the questions about his conversations with Mr. Perry.

We find that Judge Ray did not abused her discretion and therefore deny leave to file.

Neither the United States Supreme Court nor the Texas Supreme Court has explicitly recognized a journalist's privilege, but some intermediate federal and state appellate courts, including this one, have done so. For example, in *Channel Two Television Company v. Dickerson*, 725 S.W.2d 470, 471 (Tex. App.--Houston [1st Dist.] 1987, no writ), a panel of this Court wrote, "The United States Supreme Court has held that a qualified privilege protects information that the press obtains by its investigations. *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972)." We find no such holding in *Branzburg*. The only citation in *Channel Two* to *Branzburg* is to the opening page of the opinion. The Fifth Circuit also recognized a first amendment privilege for journalists in *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1993), but candidly acknowledged the difficulty of finding support for that position in *Branzburg*, stating, "Our course was dictated by our careful reading of the plurality and concurring opinions in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972)." Again, no particular page of the 20-page *Branzburg* opinion is cited.

The existence of the privilege is apparently gleaned from the fact that the four dissenting justices in *Branzburg* would have granted a privilege even to a reporter called before a grand jury,[1] while the one concurring judge would not have done so, but suggested there could be such a privilege in some other circumstances.[2] Under this state of the law, we believe that the unqualified statement in *Channel Two* that the United States Supreme Court has created a qualified privilege for journalists is too broad.

Our law of privileges was codified by the Texas Supreme Court on September 1, 1983, in the Rules of Civil Evidence. Although *Branzburg* was decided nine years earlier, the court did not include any privilege for journalists. On the contrary, it declared that no person has a privilege except as provided by the Constitution, statute, or supreme court rules.

---

1 *United States v. Caldwell*, 408 U.S. 711, 92 S.Ct. 2686 (1972) (dissenting opinion by Justice Douglas, in which he indicates his dissent in *Branzburg*); *Branzburg*, 408 U.S. at 710. 92 S.Ct. at 2671 (Stewart, J., Dissenting, joined by Justices Brennan and Marshall).

2 *Branzburg*, 408 U.S. at 710, 92 S.Ct. at 2671 (Powell, J., concurring).

TEX. R. CIV. EVID. 501. Now, more than seven years after *Channel Two* was decided, the rules still do not provide any privilege for journalists. We express no opinion, however, on the ultimate question of whether such a privilege exists because, under the facts of this case, the trial judge did not abuse her discretion.

It is undisputed that Mr. Perry's identity was discovered by Mr. Turner's own means, without any judicial compulsion. Mr. Perry has no confidentiality left to protect, having already testified about what he did or did not tell Mr. Dolcifino. The reason for having a reporter's privilege is so informants will know that if they speak to the press, courts will not force the press to disclose their identity. Plainly, there is not danger of that here. Moreover, Judge Ray's order and her letter to the parties state that the contents of the meetings and documents produced between Dolcifino and Perry must be revealed "unless the revelation of that information will lead to another confidential source." Judge Ray has provided for that, too, by stating that "[p]rocedural safeguards can be placed to insure that this will not occur."

Considering these particular facts, the specific questions Dolcifino has been ordered to answer, and Judge Ray's stated determination to protect Dolcifino from revealing any sources that are still confidential, we conclude that relief is not justified.

Relator's motion for leave to file petition for writ of mandamus is **DENIED**.

It is so **ORDERED**.

PER CURIAM

Panel consists of Justices Cohen, Wilson, and Andell.

Publish. TEX. R. APP. P. 90.

Judgment rendered and opinion filed June 15, 1995.

A true copy attest:

/s/ MARGIE THOMPSON
Margie Thompson
Clerk of Court

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-95-00453-CV

WAYNE DOLCIFINO, Relator
V.
THE HONORABLE ELIZABETH RAY, Respondent

Original Proceeding on Motion for Leave to File Petition for Writ of Mandamus

---

AMENDED ORDER

Relator's "Motion For Rehearing Of Motion To File Petition For Writ Of Mandamus and Suggestion of En Banc Consideration" is **DENIED.**

It is so **ORDERED.**

EN BANC

Chief Justice Oliver-Parrott and Justices Cohen, Hutson-Dunn, Mirabal, Wilson, Hedges, Andell, and Taft voted to deny the motion. Justice O'Connor voted to grant the motion.

Do not publish. TEX. R. APP. P. .90.

Order issued AUG 24 1995
True Copy Attest:

//s/ MARGIE THOMPSON
Margie Thompson
Clerk of Court

[SEAL]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

October 12, 1995

Mr. Edgar Leon Carter
Jackson & Walker
901 Main Street
Suite 6000
Dallas, TX 75202-3797

Mr. Charles L. Babcock
Jackson & Walker
901 Main Street
6000 InterFirst Plaza
Dallas, TX 75202

Mr. Robert P. Latham
Jackson & Walker
1100 Louisiana, Suite 4200
Houston, TX 77002

Mr. Ronald G. Franklin
Franklin Cardwell & Jones
Texas Commerce Tower
600 Travis, 24th Floor
Houston, TX 77002

Mr. Ralph S. Carrigan
Carrigan Lapin Landa & Wilde
500 Dallas, Suite 2600
Houston, TX 77002

Mr. Robert E. Lapin
Carrigan Lapin Landa & Wilde
One Allen Center
500 Dallas, Suite 2600
Houston, TX 77002-4708

RE: Case Number 95-0869

Style: WAYNE DOLCIFINO v. THE HONORABLE ELIZABETH E. RAY, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Sincerely,

JOHN T. ADAMS, CLERK

By: /s/ COURTLAND CROCKER
Courtland Crocker

cc: Honorable Elizabeth Ray

[SEAL]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 9, 1995

Mr. Edgar Leon Carter
Jackson & Walker
901 Main Street
Suite 6000
Dallas, TX 75202-3797

Mr. Charles L. Babcock
Jackson & Walker
901 Main Street
6000 InterFirst Plaza
Dallas, TX 75202

Mr. Robert P. Latham
Jackson & Walker
1100 Louisiana, Suite 4200
Houston, TX 77002

Mr. Ronald G. Franklin
Franklin Cardwell & Jones
Texas Commerce Tower
600 Travis, 24th Floor
Houston, TX 77002

Mr. Ralph S. Carrigan
Carrigan Lapin Landa & Wilde
500 Dallas, Suite 2600
Houston, TX 77002

Mr. Robert E. Lapin
Carrigan Lapin Landa & Wilde
One Allen Center
500 Dallas, Suite 2600
Houston, TX 77002-4708

RE: Case Number 95-0869

Style: WAYNE DOLCIFINO v. THE HONORABLE ELIZABETH E. RAY, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file petition for writ of mandamus in the above styled case.

Sincerely

JOHN T. ADAMS, CLERK

BY: /s/ MICHAEL C. MURPHEY,
Michael C. Murphey, Deputy Clerk

cc: Honorable Elizabeth Ray